

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9100

File: 20-451886 Reg: 10072621

MAROUN BOUTROS, dba Big Bear Market
1510 South Santa Fe Avenue, Los Angeles, CA 90021,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 22, 2010

Maroun Boutros, doing business as Big Bear Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days for the sale of an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Maroun Boutros, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 27, 2007. On

¹The decision of the Department, adopted March 10, 2010, and the letter denying withdrawal of the Stipulation and Waiver are set forth in the appendix.

January 14, 2010, the Department issued an accusation against appellant charging that on November 18, 2009, appellant's clerk, Alan Moreno, sold an alcoholic beverage to Carlos A. Delacruz, a person under the age of 21 years, in violation of Business and Professions Code section 25658, subdivision (a).

On January 27, 2010, appellant signed a Stipulation and Waiver form, acknowledging receipt of the accusation and other forms, waiving all rights to a hearing, reconsideration and appeal, and requesting the imposition of a fine in lieu of suspension. No administrative hearing was held, and thereafter, on March 10, 2010, the Department issued its decision which determined that appellant's license should be suspended for 25 days. Subsequently, on March 24, 2010, appellant attempted to withdraw the Stipulation and Waiver. On April 1, 2010, the Department denied the withdrawal.

Appellant filed a timely appeal raising the following issues: Appellant should be permitted to withdraw the Stipulation and Waiver because: (1) under contract law, no final or binding stipulation agreement ever existed, since the terms of the agreement were not understood by appellant, (2) denial of the withdrawal would deny appellant due process, and (3) the penalty is excessive.

DISCUSSION

I

Appellant first contends that he should be permitted to withdraw the Stipulation and Waiver because under contract law, no final or binding stipulation agreement ever existed, since the terms of the agreement were not understood by appellant.

In *Sood* (1999) AB-7404, we said: "It has been the Board's position in all cases previously decided, that appellants may not, in matters where a stipulation and waiver

form waives appeal, raise substantive issues on the merits of the facts of the case. However, appellants may raise the narrow issues of due process and substantial justice: has the appellant been dealt with fairly."

The law is clear that a person who signs a contract without reading it, or having it read to him, is nonetheless bound by the terms of the contract, in the absence of fraud, duress, or a relationship of trust and confidence. (See, e.g., *Greve v. Taft Realty* (1929) 101 Cal.App. 343 [281 P. 641] [commission agreement executed by corporate officers]; see also, *Silva v. Silva* (1916) 32 Cal.App. 115 [162 P. 142] [rejecting spouse's claim that separation agreement signed by him was not binding because he did not understand its terms].)

"Stipulations in administrative proceedings would not serve the purpose for which they are intended if they were voidable at the option of the licensee" (*Stermer v. Bd. of Dental Examiners* (2002) 95 Cal.App.4th 128, 133 [115 Cal.Rptr.2d 294].) However, as with all other contracts, a stipulation for settlement may be rescinded if it was procured through fraud, duress, undue influence, or mistake. (Civ. Code §1689, subd. (b)(1).) So the question becomes, was the Stipulation and Waiver procured in such a way that it may be rescinded by appellant?

Appellant maintains that at the time he signed, he "did not fully comprehend his rights nor the nature and effect of the Stipulation and Waiver and did not understand his rights to defend against the Accusation in this matter through the administrative process." (App.Br. 3) This was because English is not his primary language, and he has difficulty comprehending written English. It should be noted that at the time he signed the Stipulation and Waiver he was not represented by legal counsel.

[T]he general rule of law in California is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provision is contrary to his intentions or understanding. In *Knox v. Modern Garage & Repair Shop* [1924] 68 Cal.App. 583, 229 P. 880, 881, it is said in the opinion, where the action was upon a contract: 'In such an action a party cannot be heard to say that he had not read the same and did not know the contents thereof. Where a party to a written contract wishes to avoid liability thereon on the ground that he did not know its contents, the question, in the absence of misrepresentation, fraud, undue influence, and the like, turns on whether he was guilty of negligence in signing without such knowledge. When he is negligent in not informing himself of the contents, and signs or accepts the agreement with full opportunity of knowing the true facts, he cannot avoid liability on the ground that he was mistaken concerning such terms in the absence of fraud or misrepresentation.'

(*Dobler v. Story* (9th Cir.1959) 268 F.2d 274, 277.)

Appellant does not maintain, and the facts do not seem to indicate that fraud, misrepresentation, or undue influence were present at the time he signed the Stipulation and Waiver. Rather, appellant would have us believe that his difficulty in understanding written English is the equivalent of a "mistake" which should excuse him from taking responsibility for signing the Stipulation and Waiver. However, appellant fails to explain how his allegedly limited grasp of English rises to the level of a mistake such that the terms of the Stipulation and Waiver were not sufficiently clear to him. Appellant states in his Opening Brief, "all I was told [*sic*] that I had two choices: (1) I could sign this form and hope to pay a fine or (2) I could agree to a suspension of my license." (App. Br. 4) On the other hand, the affidavit of the Supervising Investigator clearly states that all of appellant's options were explained to him, including the option to request a hearing and that appellant seemed to understand everything that was said. (Ex. 1, Dept. Reply Brief.)

It seems clear that appellant knew that there was an accusation regarding a sale

to a minor, that his license could be suspended for 25 days, and that he was requesting to pay a fine in lieu of the suspension rather than ask for a hearing. These facts do not support a conclusion that the contract was void *ab initio* because the terms were not clear to the appellant, nor do they support fraud, misrepresentation, or undue influence in the transaction.

II

Appellant contends secondly that he should be permitted to withdraw the Stipulation and Waiver because denial of the withdrawal would deny appellant due process.

Procedural due process is met in an administrative setting if the party receives notice, a copy of the charges against him, and the right to respond before a reasonably impartial adjudicator. (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219 [79 Cal.Rptr.2d 910].)

Appellant does not maintain that he failed to receive notice or a copy of the accusation; he acknowledges receipt of the accusation and the meeting with the Supervising Investigator. However, appellant would have us believe that notice (and therefore, due process) was inadequate because he didn't understand the terms of the Stipulation and Waiver.

Courts have held that "a due process right to a hearing, like any constitutional right, can be waived" (*Barberic v. Hawthorne* (C.D. Cal. 1987) 669 F.Supp. 985, 991.) But this waiver must be knowing and voluntary. (See *Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [58 S.Ct. 1019].)

The primary question before the Appeals Board is whether appellant's signing of the Stipulation and Waiver was knowing and voluntary. The facts support that it was

both. The affidavit of the District Administrator (*supra*) states that appellant's options were explained and that appellant understood what he was signing. The Stipulation and Waiver itself, and more importantly the attachment to it, state that appellant understood his right to a hearing, the stipulation and waiver process, his right to be represented by counsel, and the fact that a decision did not have to be made at that time. Nevertheless, appellant chose to sign the Stipulation and Waiver.

Counsel for appellant would have us believe that because of appellant's poor comprehension of English, his client cannot be held to account for signing the Stipulation and Waiver or to be expected to know the process and procedure for disciplinary measures under the Department of Alcoholic Beverage Control. However, this licensee has been in business since June of 2007, and in 2008 he was subject to discipline for violation of the same statute which is at issue in this proceeding. In the previous matter, appellant paid a fine as part of an offer in compromise, which presumably also involved the signing of a Stipulation and Waiver. We find it difficult to believe that appellant is as naive as his counsel would have us believe, and that his understanding was so limited that he did not understand the nature of what he was signing in this matter.

III

Appellant contends that the penalty is disproportionate to the offense, citing the California Constitution's provisions proscribing cruel and unusual punishment. The concept of cruel and unusual punishment is a province of the field of criminal law; the term has no application in administrative proceedings.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287, 293 [341 P.2d 296].)

However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].)

Appellant does not characterize the penalty as an abuse of discretion, instead relying on the constitutional provisions relating to cruel and unusual punishment. Because the penalty is higher than he had hoped for he says it is "unusual."

There are several reasons why we must reject appellant's argument. A license suspension flowing from administrative proceedings under the Alcoholic Beverage Control Act is disciplinary in nature, and is not considered punishment within the meaning of article 1, section 17, of the California Constitution. Appellants paid a fine in lieu of a suspension for a sale-to-minor violation in 2008. Thus, this was a second violation in a two-year period. Based upon the penalties in similar cases reviewed by the Appeals Board, and the guidelines promulgated in rule 144 (Cal. Code Regs., tit. 4, §144), the 25-day suspension would appear to be well within the discretion of the Department.

ORDER

The decision of the Department is affirmed.²

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.